Filed 8/19/16 Kent v. The Wine Group CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DAVID KENT, Plaintiff and Appellant, v. THE WINE GROUP, LLC et al., Defendants and Respondents.	A145104 (San Francisco County Super. Ct. No. CPF-14-514049)

David Kent appeals from the trial court's order denying his petition to vacate an arbitration award entered in favor of The Wine Group, LLC (TWG). Kent argues that the arbitrator improperly (1) modified the arbitration award and (2) determined that TWG was entitled to attorney fees as the prevailing party. TWG has moved to sanction Kent for filing a frivolous appeal, and Kent has responded with his own motion for sanctions. We affirm the trial court's order and deny both sanctions motions.

I.
BACKGROUND

TWG is a decades-old wine company. Kent joined the company in August 2000 as its chief marketing officer. The following year, he became its chief executive officer (CEO). Kent's employment was at will.

In 2002, a membership agreement was memorialized to promote the long-term viability of the company. The agreement established a three-tiered stock system that allowed long-standing partners to liquidate their ownership stakes, which enabled them to leave, and granted ownership stakes to new partners, which encouraged them to join.

Kent helped draft the agreement, and he signed it along with subsequent amendments in 2007 and 2012. The membership agreement contained an arbitration clause.

Kent was the CEO From 2001 to 2012, and during this time TWG's net revenue increased from $213.8 to $969.4 million, and its earnings before interest and tax increased from $15 to $150 million. TWG insiders called the company's growth during Kent's tenure "extraordinary."

In or around 2011, the relationship between Kent and TWG began to sour as Kent's behavior became increasingly mercurial. The company considered firing Kent, but the parties eventually reached a transition agreement that called for him to be replaced as the CEO and to become a vice chairman of the board of directors and an advisor. Kent breached the agreement almost immediately. In February 2013, the TWG board of directors voted unanimously to terminate Kent, remove him from the board, and redeem his shares in the company.

After the February 2013 board vote, TWG offered Kent a separation agreement. Under the proposal, Kent would have received over $29 million paid over time, in exchange for a release of claims against TWG. The proposal was not accepted, and Kent was then removed from the board of directors and as an advisor. TWG later notified Kent that some of his stock, which had a total value of about $20 million, would be converted in accordance with the terms of the membership agreement. In January 2014, TWG paid Kent over $4 million for the first set of his redeemed shares.[1] The remaining $16 million was subject to be redeemed over the next four years in accordance with the agreement, with the next $4 million payment scheduled for October 2014.

TWG filed a demand for arbitration with Judicial Arbitration and Mediation Services (JAMS) seeking a declaration that its termination of Kent's employment was valid and that it was entitled to convert Kent's shares of stock as contemplated under the membership agreement. Kent filed counterclaims on behalf of himself and derivatively

[1] At the time of the arbitration award, Kent's remaining stock was worth more than $16 million.

on behalf of TWG for breach of fiduciary duty, gross mismanagement, waste of corporate assets, breach of the membership agreement, promissory estoppel, and conspiracy. He also filed a separate demand for arbitration with American Arbitration Association (AAA). In the JAMS case, which is the arbitration giving rise to this appeal, the arbitrator held a 15-day hearing, during which the parties called 11 witness and introduced nearly 150 exhibits.

On May 19, 2014, the arbitrator issued an "interim award" and found against Kent on the legal issues on all counts. The arbitrator nevertheless exercised his discretion to award Kent the $29 million that TWG had offered in its February 2013 proposed separation agreement. The arbitrator noted that Kent had accomplished great things for TWG and used the proposed separation agreement as a measure to value Kent's contribution. Kent had claimed that he was entitled to over $95 million.

The arbitrator explained that the award was subject to two potential offsets. First, the arbitrator stated that the award would be reduced by any attorney fees awarded to TWG if it was ultimately determined to be the prevailing party. In the words of the arbitrator, "TWG should be free from any concern that the value of Kent's contribution to the company was set prior to this lengthy and expensive litigation." Second, the arbitrator explained that Kent's award would be reduced by any amount awarded to Kent in the parallel AAA arbitration. The arbitrator found that Kent should not gain a double recovery for having continued litigation of the AAA arbitration when the $29 million proposed separation agreement was offered to end litigation. In the award, the arbitrator expressly reserved jurisdiction to determine which party was the prevailing party and any entitlement to attorney fees.

On May 27, TWG asked for two clarifications. It asked the arbitrator to clarify that the $29 million award was inclusive of, and not in addition to, the $20 million to which Kent was already entitled under the membership agreement, and it asked the arbitrator to clarify that the award did not affect the contractually agreed-upon five-year payment schedule. In his response dated June 3, Kent did not dispute that the award was inclusive of the $20 million to which he was entitled under the membership agreement,

but he did object to being paid in installments instead of getting a lump sum. In Kent's words, "Altering the Award to create, in effect, a mandatory injunction to abide by a contractual agreement [to distribute the award pursuant to a schedule], is simply beyond the scope of permissible clarification allowed by [JAMS] Rule 28(j)."

On June 23, the arbitrator issued an "order explaining certain implications of the Interim Award." (Upper case letters changed to lower case.) In it, the arbitrator clarified that the $29 million award was inclusive of the $20 million Kent was entitled to under the membership agreement. The arbitrator also clarified that the award was inclusive of the roughly $4 million that TWG paid Kent in January 2014 for the first set of his redeemed shares. Finally, the arbitrator clarified that the award did not modify the payment schedule for the $20 million. The arbitrator explained: "The Award found that TWG was within its rights in imposing the settlement of Kent's entitlements in the way that it did; the Award, while validating that settlement and establishing it as a 'floor,' did not modify it." The arbitrator concluded: "While the undersigned does not intend to modify the substance of the Interim Award, the form of the Final Award can be discussed with counsel to be sure that its wording clearly sets forth what has been ordered."

On July 17, the arbitrator issued an order designating TWG as the prevailing party. In doing so, the arbitrator explained that TWG had prevailed on all of its claims and all of the counterclaims asserted against it. The arbitrator found unpersuasive the argument that Kent was the prevailing party because he had been awarded $9 million more than he was entitled to under the membership agreement.

A "final award" was issued on September 15, 2014. The vast majority of the award is identical to the interim award. Once again, the arbitrator found for TWG on all claims but nonetheless exercised its discretion to award Kent $29 million. Consistent with its June 23 order, the arbitrator stated that the award was inclusive of the $20 million Kent had received or would receive, regardless of any discretionary award, and stated that the five-year payment schedule for the outstanding award would remain in effect. The arbitrator also awarded TWG $3,249,773.82 in attorney fees, after it found that

TWG's request for $3.5 million in fees was excessive. TWG was also awarded $356,617.49 in costs.

Kent then filed in San Francisco Superior Court a petition to vacate the final award. He asserted two claims. First, he claimed that the arbitrator improperly modified the terms of the interim award, reducing its value by millions of dollars. According to Kent, the interim award was a final award as a matter of law and could not be subsequently modified. Second, he claimed that the arbitrator exceeded his authority and engaged in misconduct by declaring TWG to be the prevailing party. He subsequently moved to strike the arbitrator's June 23 order, which had explained the interim award. TWG opposed both the petition to vacate and the motion to strike.

On March 10, 2015, the trial court denied Kent's petition to vacate, confirmed the final award, and denied Kent's motion to strike. The court first rejected Kent's argument that the arbitrator's clarification of the interim award constituted a substantive modification, and that the arbitrator lacked jurisdiction to modify the award because the time had expired to make a new award. The court concluded that Kent waived this argument by failing to file an objection regarding timeliness with the arbitrator. While Kent maintained that he objected to timeliness in an August 15, 2014 letter, the court found the "gist of that letter is that the interim award is the final award." The trial court also found that "[t]he interim award was interim and an arbitrator is allowed to adjudicate the case in an incremental manner." As to the attorney fees issue, the court held that the arbitrator has the authority to determine the prevailing party, "[Kent] is basically arguing a legal error, which is not reviewable."

II.
DISCUSSION

A. Standard of Review

To the extent the trial court made findings of fact in denying Kent's motion to vacate, we affirm those findings if they are supported by substantial evidence. (*Cooper v. Lavely & Singer Professional Corp.* (2014) 230 Cal.App.4th 1, 11–12.) The trial court's

legal determinations are reviewed de novo. (*Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1416.)

A highly deferential standard of review is applied to the arbitration award itself. (*Cooper v. Lavely & Singer Professional Corp.*, *supra*, 230 Cal.App.4th at p. 12.) "Generally, courts cannot review arbitration awards for errors of fact or law, even when those errors appear on the face of the award or cause substantial injustice to the parties." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916.) " 'The merits of the controversy between the parties are not subject to judicial review.' [Citations.] More specifically, courts will not review the validity of the arbitrator's reasoning." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11.) " 'When parties contract to resolve their disputes by private arbitration, their agreement ordinarily contemplates that the arbitrator will have the power to decide any question of contract interpretation, historical fact or general law necessary, in the arbitrator's understanding of the case, to reach a decision. [Citations.] Inherent in that power is the possibility the arbitrator may err in deciding some aspect of the case. Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for " '[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement.' " [Citations.] ' " (*Hoso Foods, Inc. v. Columbus Club, Inc.* (2010) 190 Cal.App.4th 881, 887.) "An exception to the general rule assigning broad powers to the arbitrators arises when the parties have, in either the contract or an agreed submission to arbitration, explicitly and unambiguously limited those powers." (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1185.)

There are a limited number of grounds for vacating an arbitration award, which are set forth in Code of Civil Procedure[2] section 1286.2. Only one of these grounds appears to be at issue here, and it allows an arbitration award to be vacated if "[t]he arbitrator[]

[2] All statutory references are to the Code of Civil Procedure unless otherwise specified.

exceeded [his or her] powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (§ 1286.2, subd. (a)(4).) " '[A]rbitrators do not exceed their powers merely because they assign an erroneous reason for their decision.' [Citations.] A contrary holding would permit the exception to swallow the rule of limited judicial review; a litigant could always contend the arbitrator erred and thus exceeded his powers." (*Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at p. 28.)

B. The Arbitrator Properly Clarified the Interim Award

Kent argues that the arbitrator exceeded his powers by modifying the interim award to establish a five-year payment schedule. He contends that the modifications constituted a substantive new award that was issued past the arbitration process's May 23, 2014 deadline,[3] and he disputes the trial court's findings that he waived his timeliness objection and that the interim award was subject to modification. He points out that the interim award stated that it resolved all issues except those related to attorney fees. All of these arguments are premised on the notion, which we reject, that the arbitrator substantively modified the initial award.

True enough, an arbitrator lacks the authority to make a substantive change to a final arbitration award where such a change results in prejudice to either party. (*Krautner v. Johnson* (1961) 189 Cal.App.2d 717, 717-719.) The Code of Civil Procedure allows an arbitrator to "correct" an award within 30 days, but only when there is "an evident miscalculation of figures or an evident mistake in the description of any person, thing or property" or where "[t]he award is imperfect in a matter of form, not affecting the merits of the controversy." (§§ 1284; 1286.6, subds. (a) & (c).) Likewise,

[3] Pursuant to JAMS rule 24(a), the arbitrator was required to render a final award or partial final award within 30 calendar days after the date of the close of the hearing, unless the parties agreed to another date. The hearing closed on March 24, 2014, and the parties agreed to extend the deadline by an additional 30 days. As discussed above, the arbitrator issued the interim award on May 19 and the final award on September 15, 2014. We conclude that the trial court did not run afoul of the JAMS deadline because there were no substantive differences in the two awards, except for the attorney fees determination.

JAMS rule 24(j) provides that an arbitrator may "correct any computational, typographical or other similar error" within several days after a final award has been issued.[4]

Neither the Code of Civil Procedure nor the JAMS rules speak directly to whether an arbitrator may later *clarify* an award. By clarifying an award we mean making clear what was intended at the time of the award, rather than altering what was intended at the time of the award. The case law suggests that a clarification is permissible. In *A.M. Classic Construction, Inc. v. Tri-Build Development Co*. (1999) 70 Cal.App.4th 1470, the arbitrator issued an award that did not resolve one of the claims submitted for arbitration. (*Id.* at p. 1472.) The arbitrator later issued an amended award resolving the outstanding claim. (*Id.* at p. 1473.) On appeal, the court held that the arbitrator did not exceed his authority, reasoning that the absence of a statutory provision authorizing an amendment does not mean that the arbitrator lacks jurisdiction to amend the award. (*Id.* at p. 1476.) The court also found that the amendment was prompt, consistent with other provisions of the original award, and not prejudicial to the legitimate interests of any party. (*Ibid.*) The court concluded, "[T]he arbitrator was simply finishing his assignment by making a complete and full award on the matters submitted to him for resolution." (*Ibid.*) The court rejected the argument that the initial arbitration award was incomplete and thus a nullity: "it would be irrational to discard all the time and money spent by the parties where an arbitration award is inadvertently incomplete in one respect and where the

[4] An arbitrator may also issue a "partial final award" and reserve jurisdiction to later decide issues which will likely arise as a result of the implementation of the remedy. (*Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415, 1419, italics omitted.) Contrary to TWG's assertion, this rule does not apply to the dispute over the payment schedule since, in the interim award, the arbitrator only reserved jurisdiction to resolve issues related to the award of attorney fees. Moreover, in the final award, the arbitrator rejected TWG's contention that the interim award was merely a tentative decision: "[W]hile in form, the Interim Award may have been called 'Interim,' in substance, the Interim Award was really a Partial Final Award, and that Partial Final Award resolved all issues except those related to attorney's fees."

oversight can be corrected without substantial prejudice to the legitimate interests of a party." (*Id.* at p. 1478.)

Just as these sensible points justify an arbitrator resolving a claim that was inadvertently left unresolved, so too do they justify an arbitrator explaining what was intended by an award. In our view, there is a distinction between an arbitrator changing what was intended, which is precluded, and explaining what was intended, which is not. Explaining what was intended in no way changes the merits of the decision.

Thus, the question here is whether the arbitrator modified the interim award or merely clarified it. We conclude it was the latter. The arbitrator's June 23 "order explaining certain implications of the Interim Award" clarified that the award should be paid in installments over five years, rather than in a lump sum. This clarification was codified in the final award. As TWG points out, the arbitrator expressly stated "[a]ny differences between . . . the Final Award and . . . the Interim Award are merely meant to explain the Arbitrator's intentions in the Interim Award, they do not modify the Interim Award as no modification of that Award is necessary."

Kent asserts that the arbitrator's ruling that the interim award was not modified is entitled to no deference and is subject to judicial review. But "[a]ny doubts as to the meaning or extent of an arbitration award are for the arbitrators and not the court to resolve."[5] (*Valsan Partners Limited Partnership v. Calcor Space Facility, Inc.* (1994) 25 Cal.App.4th 809, 818.) We see no reason why the arbitrator's conclusion that the initial award contemplated a payment schedule should be treated differently from any other legal or factual determination. The authority cited by Kent on this issue is inapposite. In *Cooper v. Lavely & Singer Professional Corp.*, *supra*, 230 Cal.App.4th 1, the court held that the arbitrator exceeded his powers by revising a final award to include

[5] Kent asserts that TWG waived this point by failing to raise it below. Not so. In its opposition to Kent's petition, TWG specifically discussed the impact of the arbitrator's determination that the award had not been modified. In any event, we have the discretion to consider new arguments on appeal so long as they raise issues of law. (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.)

attorney fees that previously had been denied. (*Id.* at p. 5.) But there was no dispute in that case that the award was substantively amended, so the court did not address whether the arbitrator's characterization of its actions was entitled to deference.

Even if we were to decline to extend deference to the arbitrator's finding, we would conclude that the finding was proper. As TWG argued below, the interim award does not state that the award was to be paid out immediately in a lump sum. Rather it concludes, "Kent is entitled to the [$29 million] settlement that TWG offered him, but that he rejected[] in February 2013." Although the February 2013 proposed settlement agreement does not appear in our record, the arbitrator described it as offering "close to $30 million (to be paid over time)." Moreover, as Kent has conceded, the $29 million awarded by the arbitrator is inclusive of the $20 million to which he was already entitled under the membership agreement. The interim award makes clear that this $20 million was to be paid out over a number of years. Specifically, it states TWG paid Kent $4 million for the first tranche of his redeemed shares in January 2014, with the remaining $16 million subject to redemption over the next four years in accordance with the agreement.

In short, the record shows that the $29 million award set forth in the interim award was tied to TWG's proposed settlement agreement, and that the settlement agreement was in turn tied to Kent's membership agreement, which provided for the redemption of stock over a number of years. While the interim award could have been more explicit on this point, the arbitrator plainly intended to provide for a payment schedule in the interim award at the time the award was issued. The arbitrator had the authority to explain his intent as he did in the June 23 order and the final award. In our view, the arbitrator properly determined that there was no modification of the award and did not exceed his authority in expressly setting forth the payment schedule in the final award.

C. Kent's Arguments Regarding Attorney Fees Are Meritless

Kent maintains that we should vacate the arbitrator's decision awarding attorney fees to TWG. His arguments are unavailing.

As an initial matter, Kent contends that the award of attorney fees was premature because the parties' requests for relief had not yet been resolved and will not be resolved until this appeal in finalized. In making his argument, he relies on *Roberts v. Packard, Packard & Johnson* (2013) 217 Cal.App.4th 822, but this reliance is misplaced. In *Roberts*, the defendant was deemed the prevailing party and was awarded attorney fees after it successfully moved to compel arbitration, but before the merits of the claims were arbitrated. (*Id.* at p. 827.) The appellate court reversed the attorney fees award on the basis that the prevailing-party status could not be determined until the substantive claims were decided in the arbitration. (*Ibid.*) Nothing in that case even remotely suggests that attorney fees may not be awarded until appeals are finalized. Kent's arguments to the contrary are meritless.

Alternatively, Kent argues that the arbitrator erred in determining that TWG was the prevailing party. But because the parties agreed to submit "[a]ny and all disputes" to arbitration, the arbitrator's prevailing-party determination is not subject to being corrected or vacated. (See *Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at p. 28.) As a result of the highly deferential standard for reviewing arbitration awards, we cannot vacate an arbitrator's attorney fees award "even where such a[n] . . . order would be reversible legal error if made by a court in civil litigation." (*Moore v. First Bank of San Luis Obispo* (2000) 22 Cal.4th 782, 784.) Contrary to Kent's contentions, *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809, is inapposite. In that case, the arbitrator exceeded his powers because the arbitrator refused, in direct contravention of a controlling contract provision, to award attorney fees to a litigant who was expressly found to be the prevailing party. (*Id.* at p. 1815.) Here, the arbitrator acted consistent with the terms of the membership agreement by awarding attorney fees to the party it determined had prevailed in the arbitration.

Even if we were to review the merits of the arbitrator's prevailing-party determination, we would conclude that it was well founded. The membership agreement states, "The arbitrator shall be empowered to award, and shall award, reasonable attorneys' fees and costs to the prevailing party (as that term is used within the meaning

of California . . . Civil [Code] § 1717)." Under Civil Code section 1717, the prevailing party is "the party who recovered a greater relief in the action on the contract." (Civ. Code, § 1717, subd. (b)(1).) Here, TWG prevailed on all claims and counterclaims asserted in the action. While it is true that the arbitrator ultimately awarded Kent $9 million over and above the $20 million he was entitled to under the membership agreement, that award was based on Kent's contributions to the company, not the merits of his claims, and it fell far short of the $95 million that Kent was seeking. For the purposes of Civil Code section 1717, the prevailing party is not necessarily the one who receives the greater monetary judgment. (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1154-1155.) Kent's argument that the arbitrator's designation of TWG as the prevailing party constituted an abuse of discretion, let alone an act in excess of authority, simply strains credulity.

Kent's argument that he is entitled to attorney fees also cannot be squared with the arbitrator's rationale for the $29 million award. Again, Kent failed to prevail on a single claim or counterclaim. In spite of this, the arbitrator awarded Kent $29 million because of Kent's contributions to TWG and the fact that the company had previously offered him this amount in the proposed separation agreement. The award was subject to the proviso that Kent's recovery would be offset by TWG's attorney fees. Kent wants to keep the $29 million award, but he asks us to disregard the equitable considerations upon which it was based. He cannot have it both ways.

D. The Motions for Sanctions Are Denied

TWG and Kent have moved for sanctions against each other. TWG argues that Kent's appeal is frivolous, while Kent argues TWG's sanctions motion is frivolous. We deny both motions.

We may impose sanctions on a party for "[t]aking a frivolous appeal or appealing solely to cause delay" or for "[f]iling a frivolous motion." (Cal. Rules of Court, rule 8.276(a)(1), (3).) An appeal is frivolous "only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is

totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Any definition of the term must be narrowly drawn "to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions." (*Ibid*., italics omitted.)

TWG does not contend that Kent's appeal was brought for an improper purpose, and, even though we agree that the appeal is meritless, we cannot conclude that it is frivolous. At least some of the trial court's grounds for denying Kent's petition for rehearing are arguable. TWG has a better case for sanctions on Kent's arguments concerning attorney fees since, as we have discussed, Kent's contentions on this issue fly in the face of well-settled law. Nevertheless, we are reluctant to sanction Kent where he had a colorable basis for asserting at least some of the arguments in his appeal. (See *Rice v. Dean Witter Reynolds, Inc.* (1991) 235 Cal.App.3d 1016, 1031 [denying sanctions where some of appellant's points were "very weak," but others merited consideration].)

Lastly, we have no difficulty in rejecting Kent's motion for sanctions. TWG's motion for sanctions was not frivolous given the overall weakness of Kent's appeal. TWG had reasonable grounds for moving for sanctions, and we cannot conclude that it brought its motion for an improper purpose.

III.
DISPOSITION

The trial court's order denying the motion to strike, denying the motion to vacate, and confirming the arbitration award is affirmed. TWG shall recover its costs on appeal. Both TWG's motion for sanctions and Kent's motion for sanctions are denied.

_____
Humes, P.J.

We concur:

_____
Margulies, J.

_____
Banke, J.